

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MONIKA N. STEWART**  
Claimant

VS.

**COLLEGE HILL NURSING HOME**  
Respondent

AND

**MANUFACTURERS ALLIANCE INS. CO.**  
Insurance Carrier

Docket No. **1,049,678**  
**& 1,055,017**

**ORDER**

Respondent and its insurance carrier (respondent) request review of the July 3, 2013, Award by Special Administrative Law Judge (SALJ) John Nodgaard. The Board heard oral argument on November 5, 2013.

**APPEARANCES**

Walter Craig of Derby, Kansas, appeared for claimant. Douglas Hobbs of Wichita, Kansas, appeared for respondent.

**RECORD AND STIPULATIONS**

The Board has considered the entire record and adopts the stipulations listed in the Award.

**ISSUES**

The SALJ found claimant sustained three compensable accidental injuries: September 26, 2009, February 15, 2010 (Docket No. 1,049,678), and March 11, 2011<sup>1</sup> (Docket No. 1,055,017). The two dockets were consolidated for hearing. The SALJ awarded claimant permanent partial disability (PPD) benefits for the September 26, 2009

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<sup>1</sup> The parties stipulated at oral argument to an accident date of September 26, 2009.

injury in Docket No. 1,049,678 based on a 66.05% work disability, computed by averaging a 100% wage loss and a 32.1% task loss.

Respondent claims the SALJ erred in determining the nature and extent of claimant's disability. Respondent argues Dr. Hufford's task loss opinion is not credible and that Dr. Fevurly's task loss opinion is the only credible opinion in the record. Therefore, respondent maintains claimant's task loss should be 13%, which when averaged with claimant's 100% wage loss, totals a 56.5% work disability.

Respondent also claims it is entitled to a credit against the award for overpaid TTD.

Claimant argues the SALJ's decision should be affirmed.

The issues on review are:

1. What is the nature and extent of claimant's disability?
2. Is respondent entitled to a credit for overpaid TTD benefits?

#### **FINDINGS OF FACT**

Having reviewed the evidentiary record, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings:

Claimant's initial injury with respondent occurred on September 26, 2009, when claimant injured her low back while lifting a resident out of bed. Respondent authorized medical treatment with Dr. Mark Dobyns. Claimant was treated and released to return to work with temporary restrictions on October 19, 2009.

The second accident occurred on February 15, 2010, when claimant was bending over to pick up laundry and noticed low back pain and an inability to stand. Claimant returned to Dr. Dobyns and was referred to Dr. A. Goel for epidural injections. The first injection provided some relief but the second did not. Respondent referred claimant to Dr. Camden Whitaker, who recommended surgery when conservative treatment with anti-inflammatory medication and muscle relaxers was ineffective. On November 10, 2010, Dr. Whitaker performed surgery consisting of an L5-S1 right laminectomy and discectomy. Dr. Whitaker also provided post-surgical treatment.

Claimant moved to Oklahoma City, Oklahoma, in late February 2011 due to financial problems from being off work.

Claimant was released by Dr. Whitaker to return to work on March 9, 2011.

On March 11, 2011, claimant had another accident she described as follows:

On that day, I was on restrictions at work, I had to give a resident a shower and after I got through giving her the shower, I went to pull her out of the shower on the dry surface and I slipped and fell trying to pull her, due to the chair was -- the shower chair was not good.<sup>2</sup>

Claimant experienced back pain approximately three hours after the shower incident. Respondent authorized claimant to return to Dr. Whitaker, but Dr. Whitaker's office told claimant she would not be again examined. Claimant contacted respondent about her inability to see Dr. Whitaker and was told to contact her attorney.

Regarding the March 11, 2011 incident, claimant testified she "aggravated that old injury by probably getting in there and trying to do my job and trying to do what I was told."<sup>3</sup> Claimant further testified:

Q. So you think it aggravated your previous injury?

A. Yeah, I think, because like I said, after my surgery, four months after that surgery, I was doing just fine, I didn't have no problem, and then after I went back to work and worked, that day and from there on, that's when I started having these other problems, so I'm thinking it's either I was not supposed to probably be bending, but my restriction at that time did not said no bending, it only said, I was going back to work on a 50-pound restriction, and the nurse sent home a 50-pound restriction, you are a regular CNA on the floor, because that's where it starts from.<sup>4</sup>

Claimant has not worked since March 2011.

Claimant's counsel contacted Dr. Whitaker's office, following which the nurse issued an off work slip dated March 17, 2011, even though claimant had not again been examined.

Claimant sought medical treatment at an emergency room in Oklahoma City on April 15, 2011. Claimant testified she was having lower back pain shooting down into her legs. The ER doctor diagnosed lumbar radiculopathy and sciatica.

Dr. Chris Fevurly, board certified in internal and occupational medicine, evaluated claimant on June 10, 2011, at the request of respondent's counsel. The doctor reviewed claimant's medical records, took a history and performed a physical examination. Dr. Fevurly found no evidence for sciatic stretch abnormality or lumbar radiculopathy. The doctor opined that claimant's examination was consistent with moderate symptom

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<sup>2</sup> R.H. Trans. at 14.

<sup>3</sup> P.H. Trans. (May 10, 2011) at 25.

<sup>4</sup> *Id.*

magnification and that she has “profound psychosocial factors which are influencing her report of pain and disability.”<sup>5</sup> In Dr. Fevurly’s opinion, claimant reached maximum medical improvement on February 28, 2011. Dr. Fevurly did not recommend any additional treatment and he concurred with Dr. Whitaker’s 50-pound lifting restriction.

Based on the AMA *Guides*,<sup>6</sup> Dr. Fevurly placed claimant in Lumbosacral DRE Category III due to claimant’s lumbar radiculopathy for a 10% whole body impairment.

Dr. Fevurly reviewed the list of claimant’s former work tasks prepared by vocational expert Steve Benjamin and concluded claimant could no longer perform 7 of the 58 tasks for a 13% task loss.

Dr. Fevurly testified regarding claimant’s diagnosis:

Q. And after you reviewed all the medical records and performed your physical examination of Ms. Stewart, what were your diagnoses that you found?

A. I think she had a right-sided L5-S1 disk herniation with resulting S1 nerve root injury or radiculopathy, and I felt that that was the result of aggravation of preexisting degenerative disk disease from her work events. There were three of them. And this contributed to her radiculopathy and disk herniation at L5-S1.<sup>7</sup>

Dr. Fevurly explained his findings concerning claimant’s moderate symptom magnification:

Well, you know, she displays a fairly dramatic exam, lots of kind of hyperactivity to light palpation, things that I wouldn’t expect to cause the type of pain that she expresses. She -- you know, she just has five out of five Waddell’s abnormalities and those kind of nonphysiologic findings. My overall impression is that there’s some moderate exaggeration of her symptoms. It’s not unusual.<sup>8</sup>

Claimant was ultimately released from Dr. Whitaker’s care in April 2012.

Dr. David Hufford, board certified in family practice and as an independent medical examiner, evaluated claimant on July 5, 2012, at the request of claimant’s counsel. The doctor reviewed claimant’s medical records, took a history and performed a physical

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<sup>5</sup> Fevurly Depo., Ex. 2 at 8.

<sup>6</sup> American Medical Ass’n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>7</sup> Fevurly Depo. at 8-9.

<sup>8</sup> *Id.* at 9-10.

examination. Dr. Hufford found claimant had reached maximum medical improvement. Dr. Hufford imposed permanent restrictions of no lifting greater than 20 pounds occasionally and 10 pounds frequently, as well as only occasional bending at the waist, and twisting and turning of her trunk.

Based on the *AMA Guides*, Dr. Hufford placed claimant in Lumbosacral DRE Category III for a 10% whole person impairment.

Dr. Hufford reviewed the list of claimant's former work tasks prepared by vocational expert Jerry Hardin and concluded claimant could no longer perform 41% of the 51 work tasks claimant performed in the 15 years preceding his injuries. Dr. Hufford also reviewed the list of claimant's former work tasks prepared by vocational expert Steve Benjamin and concluded claimant could no longer perform 17 of the 53 tasks for a 32.1% task loss.

Mr. Hardin conducted a personal interview with claimant on August 16, 2012, at the request of claimant's attorney. He prepared a task list of 51 nonduplicative tasks claimant performed in the 15-year period before her injury. At the time of the interview, claimant was not working.

Mr. Benjamin conducted a telephone interview with claimant on September 19, 2012, at the request of respondent's attorney. He prepared a task list of 53 nonduplicative tasks claimant performed in the 15-year period before her injury. At the time of the interview, claimant was not working. Mr. Benjamin opined that claimant is capable of earning \$342 based upon a 40-hour week.

### **PRINCIPLES OF LAW AND ANALYSIS**

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.<sup>9</sup> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."<sup>10</sup>

Permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged

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<sup>9</sup> K.S.A. 2009 Supp. 44-501(a).

<sup>10</sup> K.S.A. 2009 Supp. 44-508(g).

together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

K.S.A. 2009 Supp. 44-525(c) provides:

In the event the employee has been overpaid temporary total disability benefits as described in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the employee is entitled to additional disability benefits, the administrative law judge shall provide for the application of a credit against such benefits. The credit shall first be applied to the final week of any such additional disability benefit award and then to each preceding week until the credit is exhausted.

The Board finds no error in the SALJ's conclusions regarding the nature and extent of claimant's injuries.

The impairment ratings of both testifying physicians are 10% to the whole person. Both imposed permanent restrictions on claimant's physical activities, albeit the doctors disagreed on the specific restrictions to be imposed. There is no dispute that claimant's wage loss is 100%, nor is there a substantial difference in the diagnoses of Drs. Fevurly and Hufford of an L5-S1 disk herniation.

It is clear from the Award that the SALJ considered all the evidence in the record, as has the Board. The Board agrees with Judge Nodgaard, who gave greater weight to the task loss evidence of Mr. Benjamin and Dr. Hufford and found claimant's task loss was 32.1%. When the 32.1% task loss is averaged with the 100% wage loss, a work disability of 66.05% results. The Board adopts the functional impairment, task loss, wage loss, and work disability findings of the SALJ.

Respondent points to testimony on page 18 of Dr. Hufford's deposition and maintains the doctor's opinions regarding restrictions and task loss are "just guessing." However, considering the entirety of Dr. Hufford's testimony and his narrative report persuades the Board Dr. Hufford was not guessing but rather was expressing his expert medical opinions that Dr. Hufford was qualified to make.

Respondent paid TTD for 52 weeks at the rate of \$346.30 per week, totaling \$18,007.60. The parties stipulated to an average weekly wage of \$582.99, which yields a compensation rate of \$388.68.

Claimant is entitled to 35.27 weeks of TTD at the rate of \$388.68 per week totaling \$13,708.74. Respondent is entitled to a credit for overpaid temporary total disability benefits in the amount of \$4,298.86 [ $\$18,007.60 - \$13,708.74 = \$4,298.86$ ], which shall be credited to the end of the award as required by K.S.A. 2009 Supp. 44-525(c).

### **CONCLUSIONS OF LAW**

1. Claimant is entitled to PPD compensation based on a work disability of 66.05%, comprised of 100% wage loss and 32.1% task loss.

2. Claimant is entitled to 35.27 weeks of TTD at the rate of \$388.68 per week totaling \$13,708.74. Respondent is entitled to a credit for overpayment of TTD benefits in the amount of \$4,298.86 to be applied to the end of claimant's award pursuant to K.S.A. 2009 Supp. 44-525(c).

The Board finds the SALJ's Award should be affirmed as modified.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>11</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, it is the Board's decision that the Award of SALJ John Nodgaard dated July 3, 2013, is affirmed as modified.

Claimant is entitled to 35.27 weeks of temporary total disability compensation at the rate of \$388.68 per week or \$13,708.74 followed by permanent partial disability compensation at the rate of \$388.68 per week not to exceed \$100,000 for a 66.05% work disability.

As of February 28, 2014, there would be due and owing to the claimant 35.27 weeks of temporary total disability compensation at the rate of \$388.68 per week in the sum of \$13,708.74 plus 195.59 weeks of permanent partial disability compensation at the rate of \$388.68 per week in the sum of \$76,021.92 for a total due and owing of \$89,730.66, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$10,269.34 shall be paid at the rate of \$388.68 per week until fully paid or until further order from the Director.

**IT IS SO ORDERED.**

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<sup>11</sup> K.S.A. 2009 Supp. 44-555c(k).

Dated this 26th day of February, 2014.

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BOARD MEMBER

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BOARD MEMBER

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Hon. John Nodgaard, SALJ